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Supreme Court, U.S.
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In The
Supreme Court of the United States

RICHARD FRENCH,

Petitioner,

v.

JONATHAN LEMERY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. LIECHTY, ESQ.
Counsel of Record for Petitioner
CROSS & LIECHTY, P.C.
7100 East Belleview Ave., Suite G-11
Greenwood Village, Colorado 80111
Tel: (303) 333-4122

MARC F. COLIN, ESQ.
Co-Counsel for Petitioner
BRUNO COLIN JEWELL & LOWE, P.C.
1999 Broadway, Suite 3100
Denver, Colorado 80202
Tel: (303) 831-1099

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether an officer, who fires a nonlethal pepper ball toward a crowd of people during a riot that accidentally strikes someone standing to the side, seizes that bystander as a matter of law under the Fourth Amendment?

2. If so, whether such law regarding seizures was clearly established under a qualified-immunity inquiry?

3. Whether the above facts may only be analyzed under the 14th Amendment's intent-to-harm requirement for purposes of a claim under 42 U.S.C. §1983?

4. May a district court avoid a qualified-immunity inquiry when the historical facts regarding the alleged violation are undisputed or conceded?

LIST OF PARTIES

In addition to Officer French, Boulder Police Chief Beckner and the City of Boulder, Colorado, were also defendants below.

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OPINIONS BELOW

The Tenth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 2009 WL 990523 and reprinted in the Appendix at 1-14. The District Court did not publish an opinion in this case. Its order is reprinted in the Appendix at 15-32.

JURISDICTION

The Tenth Circuit filed its decision on April 14, 2009, and entered an order denying Petitioners' motion for rehearing on June 10, 2009. **See** App. 33. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on a writ of *certiorari*.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendments to the Constitution of the United States

ARTICLE IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures will not be violated . . .

ARTICLE XIV

§1 . . . nor shall any state deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF FACTS

Mr. Lemery claimed that Petitioner, Officer French, deprived him of his fourth amendment rights or, in the alternative, of his 14th amendment, substantive due process rights, when Officer French fired a pepper ball that injured Mr. Lemery's eye – he brought a claim for damages under 42 U.S.C. §1983. The district court had jurisdiction over this federal question under 28 U.S.C. §1331.

This case concerns the quelling of a Halloween-night student riot on the University of Colorado campus in Boulder, Colorado. Mr. Lemery, a college student, was an innocent bystander who was chased out the back of his house by students who sought his house as refuge from tear gas that had been released in front of his house (to the east of his house). He saw a police car in the street to the south of his house (his house was on the corner) and was heading toward it to obtain help in removing the people from his house. At the time that Mr. Lemery was heading toward the police vehicle, Officer French, who was driving the vehicle that Mr. Lemery saw, was preparing to drive forward (to his east) to where the tear gas had been deployed.

However, there was a crowd of people to Officer French's north and slightly behind him (to the west of Mr. Lemery), which Officer French believed threatened his vehicle (the three parties presented a rough triangle with Officer French at the southern point, the crowd at the northwest point, and Mr. Lemery at the northeast point). Earlier that evening Officer French had almost been trapped by students coming in behind his car, so, to keep the instant crowd at bay, Officer French was shooting a pepper-ball launcher (a paint-ball gun equipped with balls filled with pepper spray, designed, as in the game, to be shot at people below the head) at the sides of cars parked in front of the crowd, causing the balls to open and release their gas – he was aiming well to Mr. Lemery's right. One of these pepper balls struck Mr. Lemery in the eye, perhaps glancing off the rear window of a parked car, although its trajectory at this point is undetermined.

Officer French testified by deposition that he never saw Mr. Lemery nor intended to strike him with a pepper ball. As Mr. Lemery was walking towards the police vehicle, he did not even know that there was a pepper-ball launcher in the police car. He had not contacted Officer French nor could he say that anyone aimed a pepper-ball launcher at him. After the pepper ball struck his eye, a videotape filmed by undercover officers walking through the crowd (App. 5, fn. 1) shows Mr. Lemery falling to the ground in the strip between the sidewalk and the curb – a young female helped him to his feet and

escorted him back to the house. In the commotion of the riot, no uniformed officer was aware of his presence, and the undercover officers filming the videotape did not interfere with, or even talk to, the woman who escorted Mr. Lemery away, nor to Mr. Lemery himself.

Officer French filed a motion for summary judgment premised upon his qualified immunity from suit,[1] assuming all the historical facts in the light most favorable to Mr. Lemery (to posture it for summary judgment). There was one historical fact left up in the air – did the pepper ball glance off a windshield or did it strike Mr. Lemery directly? Officer French said he did not aim at Mr. Lemery and Mr. Lemery could not say that he did. Circumstantial evidence indicated that the pepper ball glanced off the windshield and accidentally struck Mr. Lemery. However, this historical fact was not dispositive to the seizure issue given that Officer French did not ask Mr. Lemery to submit to his authority or otherwise seize him.[2]

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[1] Another defendant, Chief Beckner, joined this motion and appeal to the Circuit, but his claimed qualified immunity was premised solely upon there being no constitutional deprivation in the first instance – the Chief was sued individually, but was not present on scene. Defendant City of Boulder did not join the appeal because it could not assert qualified immunity.

[2] Neither the panel nor the district court even noted that the path of the pepper ball was unknown, *i.e.*, it was irrelevant to their respective decisions. At any rate, it is undisputed that

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The trial court dismissed the fourth amendment claim upon grounds that there was no seizure in the first instance.[3] It held that

> Lemery was momentarily stopped in his driveway[4] after he was hit. However, a short time after he was hit, he walked back into his house, unimpeded by any police commands or police actions. Even if French did intend to terminate Lemery's freedom of movement by firing the pepper ball, French did not accomplish that goal. Again, Lemery got up and walked away shortly after he was hit with the pepper ball. These undisputed facts do not establish a Fourth Amendment seizure.

See Order, App. 22-23, quoted by the panel, App. 8.

However, the district court held that there were factual questions as to whether Officer French intentionally targeted Mr. Lemery, a necessary predicate to assert a 14th amendment deprivation. Officer French took an interlocutory appeal of this decision upon the ground that there was no evidence that Officer French targeted Mr. Lemery, and, furthermore, the

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the pepper ball either stuck Mr. Lemery directly or after glancing off a rear window.

[3] It also stated that the individuals were entitled to qualified immunity on this claim. App. 30-31.

[4] Mr. Lemery said that he was hit deeper in his driveway, *i.e.*, further away from the officers. Officer French used the videotape as the uncontradicted evidence. **See *Scott v. Harris***, 550 U.S. 372, 378 (2007).

mere targeting of a suspect with a nonlethal weapon (pepper balls are designed to strike people without injuring them) does not amount to a 14th amendment deprivation absent an intent to injure Mr. Lemery by aiming at his head (of which Officer French asserted there was no evidence), as required under ***County of Sacramento v. Lewis***, 523 U.S. 833, 836 (1998).

Mr. Lemery filed a cross-appeal regarding the dismissal of the fourth amendment claim (filed 15 days out of time), and the panel dismissed the cross-appeal for lack of jurisdiction. **See** App. 7, fn. 2: "Because we reverse the district court's summary judgment order denying qualified immunity due to the legal error in analyzing Lemery's claim, we do not exercise pendent jurisdiction over Lemery's cross-appeal. Lemery's cross-appeal is dismissed for lack of jurisdiction."

The panel never considered the 14th amendment issues in Officer French's interlocutory appeal. Instead, the panel announced that because under ***Graham v. Connor***, 490 U.S. 386, 395 (1989), all claims of excessive force in seizure cases must be analyzed under the Fourth Amendment, and that this case concerned a seizure, the panel would ***only*** apply the Fourth Amendment and would disregard the 14th Amendment. App. 10. It reasoned as follows: "Lemery was struck in the eye by a pepper ball shot by officer French. Lemery was momentarily stopped before running away. As a result, there was 'governmental termination of freedom of movement through means

intentionally applied,'" *quoting* ***Brower v. County of Inyo***, 489 U.S. 593, 596-97 (1989). App. 13.

The panel did not examine whether the law was clearly established as to whether the above facts would constitute a seizure. Thus, the panel passed over this aspect of the qualified-immunity inquiry.

Officer French submitted that the undisputed facts could show that the pepper ball accidentally struck Mr. Lemery. *Compare* ***Moore v. Indehar***, 514 F.3d 756 (8th Cir. 2008) (because there was a dispute of fact as to whether an officer accidentally hit the fleeing plaintiff with a bullet, while aiming at his companion suspect, it was error to decide on summary judgment whether a seizure of the plaintiff occurred). Because the panel did not remand for a finding on this point,[5] this meant that such a fact could support the seizure, that is, the panel necessarily held that even accidental contact could constitute a seizure. It then remanded for a determination as to whether the seizure was reasonable.[6] **See** App. 14.

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[5] Neither the panel nor the district court even noted that the path of the pepper ball was unknown.

[6] In the end, the panel only considered the matter over which it concurrently held it had no jurisdiction, to wit, whether there was a fourth amendment violation (the subject of the dismissed cross-appeal). Thus, when the panel said above that it had dismissed the cross-appeal, that was in name only because the subject of the cross-appeal was the only matter that the panel actually considered.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* to correct the Circuit's improper application of ***Brower***. The panel stated that a seizure occurred because "Lemery was momentarily stopped before running away. As a result, there was 'governmental termination of freedom of movement through means intentionally applied.' ***Brower***, 489 U.S. at 596-97." App. 13. Thus, the Circuit applied the words "intentionally applied" to the intent to fire the pepper-ball launcher, not to the intent to take Mr. Lemery into custody or otherwise to detain him. The videotape shows Mr. Lemery walking away without acceding to any police authority – no policeman even spoke to him. In short, the panel assumed that a seizure could occur by intending to alter someone's movement ***away*** from the officer.

This is unprecedented and Officer French has found no other case in which a seizure involves a movement ultimately away from the officer, as opposed to movement in which the officer contacts the person. Under this reasoning, if Officer French had hit Mr. Lemery in the legs, causing him to turn away (the desired use of a pepper-ball launcher), he would have seized Mr. Lemery.[7] Or, if an officer were to

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[7] Obviously, this case is about the injury to Mr. Lemery's eye. But the injury has nothing to do with the fourth amendment analysis of whether a seizure occurred in the first instance. That analysis focuses solely on whether "there was

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order a passerby not to approach a crime scene, that also would constitute a "seizure" because the bystander's freedom of movement would have been terminated (the bystander could not walk forward) through the officer's words intentionally directed at him. This, of course, is not the law.

Furthermore, the panel disregarded the argument that the facts could support Officer French's claim that the contact was accidental – the pepper ball could have deflected off the rear window of a parked car. Thus, the panel held for the first time that there could be an accidental seizure under the Fourth Amendment.

The panel clearly misapprehended the reasoning of ***Brower***, which states in full as follows:

> a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby) nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

'governmental termination of freedom of movement through means intentionally applied.'"

489 U.S. at 596-97 (emphasis in original). The ***Brower*** Court made clear that "a governmentally caused termination of an individual's freedom of movement (the innocent passerby)," *i.e.*, Mr. Lemery's situation, does ***not*** involve a seizure. Thus, Petitioner requests that this Court grant the Petition to correct such a plain error.

In addition, the panel did not examine whether this law regarding seizures (that a person may be accidentally seized, even if that person does not acquiesce to police power) was clearly established.

Second, the panel's holding is contrary to the universal holdings from other Circuits, which is not surprising given their correct application of ***Brower***.[8] **See**, *e.g.*, ***Moore v. Indehar***, 514 F.3d 756, 762 (8th Cir. 2008) (whether an officer accidentally hit the fleeing plaintiff with a bullet, while aiming at his companion suspect, prevented summary judgment of whether plaintiff was seized); ***Dunigan v. Noble***, 390 F.3d 486, 493 (6th Cir. 2005) (a seizure did not occur when an officer's police dog bit the plaintiff who unintentionally stepped into the dog's defensive perimeter); ***Medeiros v. O'Connell***, 150 F.3d 164, 168 (2nd Cir. 1998) (no seizure where the officers accidentally shot a hostage); ***Rucker v. Harford County***, 946 F.2d 278, 281 (4th Cir. 1991) (no seizure when bystander is unintentionally injured); and

[8] All of the reasons for granting the Petition ultimately return to the fact that the panel did not follow ***Brower***.

Landol-Rivera v. Cosme, 906 F.2d 791, 795 (1st Cir. 1990) (no seizure of hostage inadvertently shot). *Compare* ***Ciminillo v. Streicher***, 434 F.3d 461, 466 (6th Cir. 2006) (a seizure did occur of a person involved in a riot who was shot with a beanbag gun because, after he "was shot, the officers told him to lie on the ground"). Therefore, this Court's intervention is necessary to ensure uniformity among the Circuits.

Third, the panel departed so far from the accepted and usual course of judicial proceedings that it calls for the exercise of this Court's supervisory power. First, the panel did not even consider the 14th amendment issue on appeal, which was the ***only*** issue briefed by Officer French. Second, because the cross-appeal was filed out of time and there was no independent basis for interlocutory, appellate jurisdiction (indeed, the cross-appeal was dismissed for lack of jurisdiction, App. 7, fn. 2), Officer French did not brief the fourth amendment issue on appeal. Nor did the panel request any briefing on the fourth amendment issue.

This meant that the panel was apparently unaware of three contrary 10th Circuit cases that correctly followed ***Brower*** and state that pushing a bystander away does not amount to a seizure; that officers pointing weapons at citizens, who do not submit to such police authority, does not amount to a seizure; and that shooting at suspects in a fleeing van, where the bullets strike hostages in the van, does not amount to a seizure of the hostages. **See** ***Clark v. Edmunds***, 513 F.3d 1219, 1222 (10th Cir.

2008); ***Reeves v. Churchich***, 484 F.3d 1244, 1253 (10th Cir. 2007); and ***Childress v. City of Arapahoe***, 210 F.3d 1154, 1157 (10th Cir. 2000). In other words, the panel's opinion stands alone against three contrary cases from the same Circuit (the panel did not refer to them in its Order and Judgment nor did the district court refer to them in its Order). Although Officer French highlighted these three cases in a Petition for Rehearing or for Rehearing *En Banc*, the panel did not reconsider its Order and Judgment and the full court did not accept review to reconcile the cases. App. 33.

Therefore, this Court's supervisory power is requested to accept this Petition and remand the matter to the Circuit to reconsider whether a seizure occurred in light of ***Brower***, ***Clark***, ***Reeves***, and ***Childress***, and to direct the Circuit to consider the 14th amendment issue that was the basis for the appeal.

Officer French also requests that this Court accept review over the proper procedures to be followed in determining a question of qualified immunity, the question put to the Circuit in the briefs below regarding the 14th amendment, substantive due process claim. The qualified-immunity inquiry has substantially evolved since ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982). This Court reiterated in ***Scott v. Harris***, 550 U.S. 372 (2007), that the inquiry is a legal inquiry, akin to a pretrial matter in a criminal case. Yet this instruction continues to meet resistance from district courts who, in a civil-case context, are

accustomed to allowing a jury to resolve these types of issues, notwithstanding that they are legal issues. In a qualified-immunity inquiry, when the historical facts are uncontradicted or conceded, the judge must determine what those facts mean under the Constitution.

In the instant case, the district court focused on the following three undisputed, historical facts. Just before Officer French fired towards the crowd, other officers were standing nonchalantly alongside Officer French's vehicle. Their non-defensive posture indicated that the crowd was not that unruly, which reduced Officer French's need to fire in its direction. **See** App. 20. Officer French even admitted, for purposes of the motion, that it was unreasonable for him to fire towards the crowd at that time, which admission did not change the fact that Mr. Lemery could not negate Officer French's testimony that striking his eye was accidental. Even if Officer French should not have deployed the pepper balls at that time, this does not establish an intent to harm – it only establishes unreasonable conduct.

The second fact upon which the district court focused was Officer French's admission that he had previously shot at people below their waist. App. 21. Finally, the court noted that there was a relatively short distance between Officer French and Mr. Lemery which "supports the inference that French targeted Lemery, as opposed to hitting him accidentally." App. 21.

From these three facts, the district court concluded that Officer French did not have qualified immunity from the 14th amendment claim for the following reason:[9]

> [v]iewing the facts in the record in the light most favorable to Lemery, . . . a reasonable fact finder could conclude that French intentionally targeted Lemery with a pepper ball while neither Lemery nor the surrounding circumstances reasonably could have been perceived as a threat to French or to other officers. In that circumstance, there would be a dramatic imbalance in the relationship between the amount of force used and the need presented. Further, Lemery was shot in the eye with a pepper ball, and the extent of the injury inflicted is significant. Finally, if the circumstances were as Lemery portrays them, then French could be seen as having acted with malice or excessive zeal that is outrageous. If a fact finder concluded that the circumstances were as Lemery portrays them, including that French acted with malice or excessive zeal, then I find, as a matter of law, that French's conduct would shock the conscience of this federal judge.

See App. 26.

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[9] Technically, this conclusion arose in the section concerning the merits of the 14th amendment claim, but the district court referred back to that section in its order denying qualified immunity regarding the 14th amendment claim. **See** App. 31.

Officer French submits that this is an elaborate way to defer a legal question to the jury. Under ***County of Sacramento v. Lewis***, 523 U.S. 833, 836 (1998), "only a purpose to cause harm" establishes a 14th amendment deprivation.[10] The above relies on one fact only – that Officer French targeted Mr. Lemery with a pepper ball, which ended up striking Mr. Lemery's eye. This is akin to kids shooting each other with paint balls (without using protective eye gear) and one kid being hit in the eye. Does this constitute an intent to harm so as to shock the judicial conscience? Only if there are facts showing that the shooter aimed at the victim's head. But, as was the case in ***Scott v. Harris***, there are ***no*** historical facts to support such a finding herein. Thus, this case boils down to the leeway given to a jury to guess as to what occurred.

Obviously, shooting a pepper ball at a rioter's legs would not establish such an intent to harm – after all, that is the intended use of a pepper-ball launcher. The fact that Officer French had earlier that evening correctly deployed his pepper ball-launcher by shooting at people below the waist, a fact cited by the district court as support to deny qualified immunity (App. 21), does not establish an intent to aim at Mr.

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[10] The ***Lewis*** Court stated this standard in a police-chase context, but it arguably applies to a student-riot context as well. **See *Lewis***, 523 U.S. at 852-53, which noted a higher than deliberate-indifference standard applies in a prison-riot context.

Lemery's head.[11] Likewise, the fact that there was a relatively short distance between Officer French and Mr. Lemery (App. 21) is meaningless given that there was no showing that Officer French actually aimed at Mr. Lemery's head. Indeed, the relatively short distance did not even ensure that Mr. Lemery saw that any officer had a pepper-ball launcher.

The district court also relied on the assertion that Officer French had no need to fire the pepper-ball launcher in the first instance at that particular time. App. 20. Officer French stated that he fired at the crowd in order to keep it at bay so that it would not follow his vehicle as he drove forward (***id.***), which had happened earlier that evening. Therefore, whether the crowd was actually throwing projectiles at the vehicle or not is of minor importance given Officer French's reason for firing at the crowd. That is, the crowd could have been lying in stealth or could have been actively throwing projectiles, but neither posture would necessarily determine whether the crowd would follow Officer French's vehicle as he drove forward.

But this is beside the point because even if Officer French could not justify firing his launcher at that time (as he conceded for purposes of the motion),

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[11] Nor was there any evidence that Officer French was trigger-happy. He deployed his pepper-ball launcher throughout the night and there was no indication of any injury or complaint regarding his other use of the pepper-ball launcher.

this does not establish that Officer French intended to strike Mr. Lemery in the head, that is, the undisputed facts do not support an inference that Officer French aimed the pepper-ball launcher at Mr. Lemery's head. Officer French denied such an intent, the circumstantial evidence supported his denial, and Mr. Lemery could offer no evidence to the contrary regarding any intent to harm. He could only point to the undeniable fact that the pepper ball hit him in the eye, but this does not establish an intent to harm. Nonetheless, the district court would allow a jury to make such a finding.

As stated above, Officer French did not dispute these historical facts (he only disputed their legal significance) because he postured the question for an immunity inquiry. Nonetheless, the district court avoided the legal question by passing it to a jury – a procedure ingrained in a district court's DNA. Thus, this case presents another version of ***Scott v. Harris*** that, in an immunity inquiry, a district court must make legal determinations when presented with undisputed, historical facts. This case does not present a question where the district court is presented with conflicting versions of what occurred. **See *Johnson v. Jones***, 515 U.S. 304, 307-08 (1995). Rather, this case presents a set of undisputed facts which may support differing legal determinations. Thus, the dispute does not concern a dispute of what occurred; rather, it concerns a dispute of what the occurrence legally means.

Given the difficulty that the district courts have with understanding that, in an immunity inquiry, they must apply the law to undisputed facts, such legal instruction merits reiteration by this Court.

CONCLUSION

The Court should grant the Petition for a Writ of *Certiorari* and either reverse the decision of the Tenth Circuit Court of Appeals or remand the matter for further consideration of qualified immunity under the Fourth Amendment in light of ***Brower***, ***Clark***, ***Reeves***, and ***Childress***, and to direct the Circuit to consider the qualified-immunity inquiry under the 14th Amendment.

Respectfully submitted,

ROBERT M. LIECHTY, ESQ.
Counsel of Record for Petitioner
CROSS & LIECHTY, P.C.
7100 East Belleview Ave., Suite G-11
Greenwood Village, Colorado 80111
Tel: (303) 333-4122

MARC F. COLIN, ESQ.
Co-Counsel for Petitioner
BRUNO COLIN JEWELL & LOWE, P.C.
1999 Broadway, Suite 3100
Denver, Colorado 80202
Tel: (303) 831-1099

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JONATHAN LEMERY,

Plaintiff-Appellee and Cross-Appellant,

v.

MARK R. BECKNER; RICHARD FRENCH, individually and in his official capacity,

Defendants-Appellants and Cross-Appellees,

and

CITY OF BOULDER,

Defendant and Cross-Appellee.

No. 07-1290 & 07-1327

(D.C. No. 06-CV-2174-REB-BNB)
(D. Colorado)

ORDER AND JUDGMENT*

(Filed Apr. 14, 2009)

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **BRISCOE**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges.

Plaintiff-Appellee-Cross-Appellant Jonathan Lemery ("Lemery") filed an action pursuant to 42 U.S.C. §§ 1983 and 1988 against Defendants-Appellants-Cross-Appellees officers Mark Beckner and Richard French and the City of Boulder ("Defendants"). Lemery alleged violations of his Fourth and Fourteenth Amendment rights.

After the district court granted summary judgment to Defendants on Lemery's Fourth Amendment excessive force claim, and denied summary judgment to Defendants on Lemery's Fourteenth Amendment substantive due process claim, both parties appealed. We reverse the district court's summary judgment order and remand for further proceedings.

I

The district court set out the facts as follows:

> This case concerns an incident in which the plaintiff, Jonathan Lemery, was hit in the eye by a pepper ball allegedly fired from a pepper ball launcher operated by defendant, Richard French. At the time of the incident, French was working as an officer on the Boulder Police Department. . . .
>
> In October, 2004, the City of Boulder gave a permit to a college student to have a

block party near the intersection of 10th Street and College Avenue on October 31, 2004. According to the plaintiff, the Boulder Police Department first was notified of the block party when defendant, Richard French, a Boulder police officer, drove by the area of 10th and College and observed the block party. French then returned to the Boulder Police Department annex, located at 13th and College. French and other officers later were called to the block party, and the police department started breaking up house parties in the area, forcing a large number of young adults into the streets of the area. The police confiscated kegs of beer as part of their efforts to break up the parties, and the crowd in the streets became unruly as this was happening. The police withdrew from the area and regrouped at 9th and College.

Sometime later, French was directed by a commander to 'deliver [tear] gas to 10th and College.' The tear gas was meant to disburse the crowd at 10th and College. French drove a police Suburban east on College Avenue from 9th toward 10th to deploy the tear gas, and the tear gas was deployed. Five or six other officers were seated in the Suburban, one was riding on the rear, and four were riding on the running boards on either side of the Suburban. French and Officer Scott Morris had pepper ball launchers.

French stopped the Suburban just west of 10th Street on College Avenue. At this

point, plaintiff Jonathan Lemery's house was just across College Avenue, north of French's car. Sergeant Seper of the Boulder Police walked up to the window of French's car to discuss the situation with French. Seper directed French and other officers present to drive their vehicles onto 10th Street from College Avenue. French says that when Seper moved away from the window of French's car, French saw people on the sidewalk on the north side of College Ave[.], near Lemery's house. French says he then fired four to eight pepper balls directly across College Avenue toward cars on the north side of College Avenue. French says he intended to have the pepper balls hit the side of the cars, but he noted that the rounds were hitting the street below the cars. French says he then raised the barrel of the pepper ball launcher and then could hear the pepper balls hitting the side of the cars. As he fired these pepper balls, French was holding the pepper ball launcher with one hand and shooting without using the sight on the pepper ball launcher.

Lemery says that after the tear gas was dispersed near his house, 15 to 20 people he did not know ran into his house, attempting to avoid the effects of the tear gas. Lemery then went out the back door of his house, and stood on the back porch for about a minute. He then decided to seek assistance in clearing the strangers from his house. He intended to seek help from police officers he saw on 10th Street, who did not appear to be

doing anything. Lemery had noticed three officers standing by French's suburban on 10th Street talking to each other. Lemery began to walk down his driveway, which led to the north side of 10th Street, toward the police Suburban on 10th Street. He was hit in the eye with a pepper ball when he was near the bottom of his driveway.

French says he was firing pepper balls at the time because he had seen people behind cars parked on the north side of College Avenue, and because people were throwing projectiles toward the police on College Avenue from the north side of the street. In addition, French says he wanted to ensure that people did not follow behind French's police car as the car moved forward toward 10th Street.

Lemery argues that the evidence in the record[1] supports a conclusion that French intentionally targeted Lemery when French fired the pepper ball that hit Lemery. Lemery has testified that the police officers standing next to French's police car were 'just kind of nonchalantly kind of hanging out' as Lemery began to approach those

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[1] Part of this "evidence in the record" is a videotape, which includes audio, of a portion of the incident. The tape shows the officers standing by the patrol vehicle, and Lemery's reaction after being hit. The tape does not show the actual firing of the pepper balls by officer French, and shows Lemery's position only after he is hit by the pepper balls.

officers. If true, this behavior by the police officers indicates that they were not being threatened by projectiles thrown from Lemery's direction, or by people hiding behind cars in Lemery's vicinity.

After an investigation of the incident, including a detailed review of a police video of the incident, the Boulder Police Department reached similar conclusions concerning the circumstances just before and after Lemery was hit with the pepper ball. The department concluded that nobody in the vicinity of French's car was hiding behind cars on the north side of College avenue, or was throwing rocks at the police officers near French's car. The department concluded also that some of the officers standing near to French's car just before Lemery was hit had their backs to the north side of College Avenue and did not exhibit any concern with being hit from a rock from the north side of College Avenue.

French stated at one time that he was targeting people on the north side of College Avenue with pepper balls, aiming to hit them below the waist. Lemery says the relatively short distance between French and Lemery also supports the inference that French targeted Lemery, as opposed to hitting him accidentally.

Joint App. at 144-48 (internal record citations omitted).

Following limited discovery, Defendants filed a motion for summary judgment based on qualified immunity. The district court granted Defendants' motion on Lemery's Fourth Amendment excessive force claim, but denied the motion on Lemery's Fourteenth Amendment substantive due process claim. Defendants filed an interlocutory appeal (case no. 07-1290) from the denial of qualified immunity on Lemery's Fourteenth Amendment substantive due process claim. Lemery filed a cross-appeal (case no. 07-1327) contending the district court erred in dismissing his Fourth Amendment excessive force claim.[2]

II

Qualified Immunity

"Once a defense of qualified immunity has been raised, we consider two questions: (1) whether the alleged conduct violated a constitutional right, and if so, (2) whether the law was clearly established at the time of the defendant's actions." *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1138 (10th Cir. 2006). In *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), the Supreme Court held that lower courts are allowed, but not required, to decide the "clearly

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[2] Because we reverse the district court's summary judgment order denying qualified immunity due to the legal error in analyzing Lemery's claim, we do not exercise pendent jurisdiction over Lemery's cross-appeal. Lemery's cross-appeal is dismissed for lack of jurisdiction.

established" prong without consideration of the first prong.

District Court Proceedings

Upon consideration of Defendants' summary judgment motion, the district court found that Lemery had not established that his Fourth Amendment rights were violated based on the conduct alleged, and therefore granted qualified immunity to the individual Defendants. Joint App. at 155. Specifically, the district court concluded there was no Fourth Amendment violation because there was no seizure:

> Lemery was momentarily stopped in his driveway after he was hit. However, a short time after he was hit, he walked back into his house, unimpeded by any police commands or police actions. Even if French did intend to terminate Lemery's freedom of movement by firing the pepper ball, French did not accomplish that goal. Again, Lemery got up and walked away shortly after he was hit with the pepper ball. These undisputed facts do not establish a Fourth Amendment seizure.

Id. at 151.

Regarding Lemery's substantive due process claim, the district court found that there were genuine issues of material fact relevant to the claim, and that, therefore, summary judgment was not

appropriate. *Id.* The district court, in setting out the facts, stated that officer French claims he fired pepper balls at the sides of cars because he saw people in the area throwing projectiles, while Lemery claims officer French intentionally shot in his direction while "nonchalantly hanging out" by the patrol vehicle. *Id.* at 146-47. The district court concluded there were material factual disputes over the threat posed to officer French and officer French's motive for shooting the pepper balls. *Id.* at 155. The district court then held that there was "prior law" establishing that Defendants' conduct was clearly prohibited, and therefore denied qualified immunity to the individual Defendants on the Fourteenth Amendment substantive due process claim. *Id.* at 155-56.

Appellate Jurisdiction

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), the Supreme Court held that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." The *Graham* Court explained that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due

process,' *must* be the guide for analyzing these claims." *Id.* (emphasis added).

Given the explicit mandate of the *Graham* Court – that "all" claims of excessive force in seizure cases "must" be analyzed under the Fourth Amendment – the present case's facts should be analyzed under the Fourth Amendment excessive force framework. We have held "[t]he initial seizure [of an individual] is governed by the Fourth Amendment" and that only "at some point after arrest . . . constitutional analysis shifts to the Due Process Clause." *Pierce v. Gilchrist,* 359 F.3d 1279, 1285-86 (10th Cir. 2004). As a result, we analyze the facts alleged in this case through the lens of the Fourth Amendment.

Generally, however, we lack jurisdiction to consider interlocutory appeals. "[B]ecause qualified immunity entitles the defendant to avoid litigation, we have jurisdiction on appeal to review purely legal questions that arise from the denial of qualified immunity." *York v. City of Las Cruces,* 523 F.3d 1205, 1209 (10th Cir. 2008) (internal quotations and alterations omitted). What constitutes a purely legal question is often a matter of debate.

"[T]he Supreme Court has limited appeals of interlocutory decisions denying the defense of qualified immunity to cases presenting neat abstract issues of law. In contrast, pretrial determinations of evidentiary sufficiency in qualified immunity cases are not immediately appealable." *Weise v. Casper,* 507 F.3d 1260, 1263-64 (10th Cir. 2007) (internal citations

and quotation omitted) ("[E]videntiary sufficiency determinations are not separable from a plaintiff's claim and thus do not constitute final decisions. . . ."). "Our jurisdiction also extends to situations where a defendant claims on appeal that accepting the plaintiff's version of the facts as true, he is still entitled to qualified immunity" based on the "clearly established law" prong of the qualified immunity test. *York*, 523 F.3d at 1209. We have also stated, however, that "[w]e lack jurisdiction to review a denial of summary judgment based on qualified immunity if the claim on appeal is based on disputed facts." *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1165 (10th Cir. 2005) (citing *Johnson v. Jones*, 515 U.S. 304, 307 (1995)).

This case certainly involves "disputed facts." However, this conclusion need not be the end of our analysis. In *Amundsen v. Jones*, 533 F.3d 1192, 1196 (10th Cir. 2008) we noted disputed facts were present in the district court, but still exercised our jurisdiction. In *Amundsen*, the district court denied qualified immunity to a police deputy on the plaintiff's claim of unreasonable search and seizure stemming from the administration of a roadside sobriety test. *Id.* at 1196. The *Amundsen* opinion expressly notes that the district court found "several issues of disputed fact" and that the district court concluded that the facts viewed in the light most favorable to the plaintiff could lead a reasonable jury to find that the sobriety test exceeded the scope of the lawful stop. *Id.*

The *Amundsen* opinion concluded, however, that appellate jurisdiction was present. The police deputy argued that the plaintiff was driving erratically, and that this alone was sufficient to create reasonable suspicion of intoxication. The plaintiff admitted that she improperly changed lanes. *Id.* at 1197. The district court also assumed that the plaintiff was weaving across lanes. *Id.* The *Amundsen* opinion concluded: "Accordingly, we have jurisdiction to determine if weaving and an improper lane change, standing alone, are sufficient to create a reasonable suspicion of intoxication." *Id.*

Here, there is no dispute over the facts related to whether Lemery was seized under the Fourth Amendment. Lemery was stopped in his driveway when he was hit by the pepper ball fired by officer French. Officer French acknowledges that he fired the pepper ball. Furthermore, the district court noted that these facts were "undisputed." Joint App. at 154. As a result, we have jurisdiction over this portion of Lemery's case.

Fourth Amendment Excessive Force

The Fourth Amendment protects individuals against "unreasonable searches and seizures." U.S. Const. amend. IV. For a Fourth Amendment excessive force claim to succeed, the plaintiff must first show that he was seized. *See Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1250 (10th Cir. 2008) ("The first step in our analysis is ordinarily to

determine whether there was a seizure under the Fourth Amendment."). A seizure occurs when there is "an intentional acquisition of physical control." *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989); *see also Scott v. Harris,* 550 U.S. 372, 381 (2007) ("'[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied.'" (quoting *Brower,* 489 U.S. at 596-97)).

Although we have stated that an assertion of force that does not cause the submission of the person targeted does not constitute a Fourth Amendment seizure, *Bella v. Chamberlain,* 24 F.3d 1251, 1255 (10th Cir. 1994), we also have stated that "when law enforcement officers shoot at a fleeing suspect, a 'seizure' occurs . . . if the shot strikes the fleeing person . . . ", *id.* (relying on *California v. Hodari D.,* 499 U.S. 621, 626-27 (1991)). Here, Lemery was struck in the eye by a pepper ball shot by officer French. Lemery was momentarily stopped before running away. As a result, there was "governmental termination of freedom of movement through means intentionally applied." *Brower,* 489 U.S. at 596-97.

To state a claim of excessive force under the Fourth Amendment, a plaintiff must show *both* that a "seizure" occurred and that the seizure was "unreasonable." *Id.* at 599. Claims of excessive force are analyzed under the *objective* reasonableness standard of the Fourth Amendment. *Graham,* 490 U.S. at 395. The reasonableness of an officer's conduct must be assessed "from the perspective of a reasonable officer

on the scene," recognizing the fact that the officer may be "forced to make split-second judgments" under stressful and dangerous conditions. *Id.* at 396-97. The Fourth Amendment standard requires inquiry into the factual circumstances of every case; relevant factors include the crime's severity, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest. *Id.* at 396.

Because the district court erroneously concluded that Lemery was not seized for purposes of his Fourth Amendment claim, the district court did not reach the question whether Lemery's seizure was unreasonable, or the facts related to that question. Therefore, we reverse the district court's entry of summary judgment, and remand to the district court for further analysis of Lemery's claim under the standards we have set forth herein.

III

We REVERSE the district court's summary judgment order and REMAND for further proceedings consistent with order. Lemery's cross-appeal is dismissed for lack of jurisdiction.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 06-cv-02174-REB-BNB

JONATHAN LEMERY,

Plaintiff,

v.

CITY OF BOULDER,
MARK R. BECKNER,
RICHARD FRENCH,
JOHN DOE 1, and
JOHN DOE 2,

Defendants.

ORDER CONCERNING MOTION FOR SUMMARY JUDGMENT

(Filed Jun. 28, 2007)

Blackburn, J.

This matter is before me on the **Motion for Summary Judgment** [#22], filed by defendants Mark Beckner, Richard French, and the City of Boulder on April 3, 2007. The plaintiff has filed a response [#29], and the defendants have filed a reply [#37]. I grant the motion in part and deny it in part.

I. JURISDICTION

I have jurisdiction over this case under 28 U.S.C. § 1331 (federal question).

II. STANDARD OF REVIEW

The purpose of a summary judgment motion is to assess whether trial is necessary. ***White v. York Int'l Corp.***, 45 F.3d 357, 360 (10th Cir. 1995). FED. R. CIV. P. 56(c) provides that the court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); ***see Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250 (1986); ***Concrete Works, Inc. v. City & County of Denver***, 36 F.3d 1513, 1517 (10th Cir.1994). Summary judgment may be granted if the court concludes that no "rational trier of fact" could find for the nonmoving party based on the showing made in the motion and response. ***Matsushita Electric Industrial Co. v. Zenith Radio Corp.***, 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." ***Concrete Works, Inc.***, 36

F.3d at 1518 (citing ***Celotex Corp.***, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in his or her pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); ***Celotex Corp.***, 477 U.S. at 324. The factual record must be viewed in the light most favorable to the nonmoving party. ***Concrete Works, Inc.***, 36 F.3d at 1517 (citing ***Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.***, 912 F.2d 1238, 1241 (10th Cir.1990)).

III. FACTS

This case concerns an incident in which the plaintiff, Jonathan Lemery, was hit in the eye by a pepper ball allegedly fired from a pepper ball launcher operated by defendant, Richard French. At the time of the incident, French was working as an officer of the Boulder Police Department. Based on this incident, Lemery asserts two claims against the defendants. First, Lemery alleges that the defendants violated his Fourth Amendment right against unreasonable seizure of his person. Second, Lemery asserts a substantive due process claim, alleging that the defendants' use of force was conscience shocking, and, thus, violated the Due Process Clause of the Fourteenth Amendment.

In October, 2004, the City of Boulder gave a permit to a college student to have a block party near the intersection of 10th Street and College Avenue on October 31, 2004. According to the plaintiff, the

Boulder Police Department first was notified of the block party when defendant, Richard French, a Boulder police officer, drove by the area of 10th and College and observed the block party. French then returned to the Boulder Police Department annex, located at 13th and College. French and other officers later were called to the block party, and the police department started breaking up house parties in the area, forcing a large number of young adults into the streets of the area. The police confiscated kegs of beer as part of their efforts to break up the parties, and the crowd in the streets became unruly as this was happening. The police withdrew from the area and regrouped at 9th and College.

Sometime later, French was directed by a commander to "deliver [tear] gas to 10th and College." *Plaintiff's response*, Exhibit 1 (French deposition), 62:19-64:24. The tear gas was meant to disburse the crowd at 10th and College. French drove a police Suburban east on College Avenue from 9th toward 10th to deploy the tear gas, and the tear gas was deployed. Five or six other officers were seated in the Suburban, one was riding on the rear, and four were riding on the running boards on either side of the Suburban. French and Officer Scott Morris had pepper ball launchers.

French stopped the Suburban just west of 10th Street on College Avenue. At this point, plaintiff Johnathan Lemery's house was just across College Avenue, north of French's car. Sergeant Seper of the Boulder Police walked up to the window of French's

car to discuss the situation with French. Seper directed French and other officers present to drive their vehicles onto 10th street from College Avenue. French says that when Seper moved away from the window of French's car, French saw people on the sidewalk on the north side of College Ave, near Lemery's house. French says he then fired four to eight pepper balls directly across College Avenue toward cars on the north side of College Avenue. French says he intended to have the pepper balls hit the side of the cars, but he noted that the rounds were hitting the street below the cars. French says he then raised the barrel of the pepper ball launcher and then could hear the pepper balls hitting the side of the cars. As he fired these pepper balls, French was holding the pepper ball launcher with one hand and shooting without using the sight on the pepper ball launcher.

Lemery says that after the tear gas was dispersed near his house, 15 to 20 people he did not know ran into his house, attempting to avoid the effects of the tear gas. Lemery then went out the back door of his house, and stood on the back porch for about a minute. He then decided to seek assistance in clearing the strangers from his house. He intended to seek help from police officers he saw on 10th Street, who did not appear to be doing anything. Lemery had noticed three officers standing by French's Suburban on 10th Street talking to each other. Lemery began to walk down his driveway, which led to the north side of 10th Street, toward the police Suburban on 10th

Street. He was hit in the eye with a pepper ball when he was near the bottom of his driveway.

French says he was firing pepper balls at the time because he had seen people behind cars parked on the north side of College Avenue, and because people were throwing projectiles toward the police on College Avenue from the north side of the street. *Motion for Summary Judgment,* Exhibit A (French deposition), pp. 87-89. In addition, French says he wanted to ensure that people did not follow behind French's police car as the car moved forward toward 10th Street. *Id.*

Lemery argues that the evidence in the record supports a conclusion that French intentionally targeted Lemery when French fired the pepper ball that hit Lemery. Lemery has testified that the police officers standing next to French's police car were "just kind of nonchalantly kind of hanging out" as Lemery began to approach those officers. *Response to motion for summary judgment,* Exhibit 5 (Lemery deposition), p. 90:21-25. If true, this behavior by the police officers indicates that they were not being threatened by projectiles thrown from Lemery's direction, or by people hiding behind cars in Lemery's vicinity.

After an investigation of the incident, including a detailed review of a police video of the incident, the Boulder Police Department reached similar conclusions concerning the circumstances just before and after Lemery was hit with the pepper ball. *Response to motion for summary judgment,* Exhibit 6. The

department concluded that nobody in the vicinity of French's car was hiding behind cars on the north side of College avenue, or was throwing rocks at the police officers near French's car. The department concluded also that some of the officers standing near to French's car just before Lemery was hit had their backs to the north side of College Avenue and did not exhibit any concern with being hit from a rock from the north side of College Avenue. *Id.*

French stated at one time that he was targeting people on the north side of College Avenue with pepper balls, aiming to hit them below the waist. *Id.*, p. 12. Lemery says the relatively short distance between French and Lemery also supports the inference that French targeted Lemery, as opposed to hitting him accidentally.

IV. ANALYSIS

A. Fourth Amendment

The defendants argue that the undisputed facts in the record show that French did not seize Lemery when French shot the pepper ball that hit Lemery in the eye. Absent a seizure, the defendants argue, Lemery cannot assert a Fourth Amendment claim based on the incident. Lemery argues contrastingly that French's actions constitute a seizure under the Fourth Amendment.

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an

> unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful.

Brower v. County of Inyo, 489 U.S. 593, 596 (1989). "(W)henever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." ***Terry v. Ohio,*** 392 U.S. 1, 16 (1968). However, an assertion of force or authority by the police which does not cause the submission of the person targeted does not constitute a Fourth Amendment seizure. ***Bella v. Chamberlain,*** 24 F.3d 1251, 1255 (10th Cir. 1994) (citing cases). For example, when police officers shoot a vehicle driven by a person who is fleeing, and when the officers create roadblocks in an effort to stop a vehicle, no seizure occurs if the force and authority used by police do not cause the fleeing person to stop. ***Id.*** (citing cases). A seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" ***Brower,*** 489 U.S. at 596-597 (emphasis in original).

Viewing the undisputed facts in the record in the light most favorable to the plaintiff, no reasonable fact finder could conclude that French's firing of the pepper ball that hit Lemery in the eye constituted a Fourth Amendment seizure. Lemery was momentarily stopped in his driveway after he was hit. However, a short time after he was hit, he walked back into his house, unimpeded by any police commands or police actions. Even if French did intend to terminate Lemery's freedom of movement

by firing the pepper ball, French did not accomplish that goal. Again, Lemery got up and walked away shortly after he was hit with the pepper ball. These undisputed facts do not establish a Fourth Amendment seizure. ***See, e.g., Bella v. Chamberlain,*** 24 F.3d 1251, 1256 (10th Cir. 1994) (shots fired by police at fleeing helicopter, including shot that hit helicopter, did not constitute a Fourth Amendment seizure; shots did not stop helicopter or cause pilot to submit to police control).

Absent a Fourth Amendment seizure, Lemery cannot establish a valid Fourth Amendment claim. Lemery's Fourth Amendment claim against all of the defendants is founded on the assertion that French's actions constituted a Fourth Amendment seizure. Therefore, the defendants' motion for summary judgment is granted as to Lemery's Fourth Amendment claim.

B. Substantive Due Process

The United States Supreme Court has held that a claim that police have used excessive force must be analyzed under the Fourth Amendment if the force in question was used in the course of a Fourth Amendment seizure. ***Graham v. Connor,*** 490 U.S. 386, 394-395 (1989). If a Fourth Amendment seizure is at issue, then a substantive due process analysis is not applicable. ***Id.*** As noted in ***Graham,*** a substantive due process analysis often has been used to analyze excessive force claims. ***Id.*** at 390-393

(citing cases); ***Dixon v. Richer,*** 922 F.2d 1456, 1460-1462 (10th Cir. 1991) (examining effect of ***Graham*** on substantive due process analysis of excessive force claims). ***Graham*** simply limits the applicability of the substantive due process analysis to situations that do not involve a Fourth Amendment seizure. As discussed above, a Fourth Amendment seizure is not at issue in this case.

Lemery alleges that French's actions violated Lemery's rights under the substantive protections of the Fourteenth Amendment's Due Process Clause. To establish a substantive due process claim, "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. Instead, a plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." ***Tonkovich v. Kansas Board of Regents,*** 159 F.3d 504, 528 (10th Cir. 1998) (citation and internal quotation marks omitted).

> We examine three factors in determining whether force was excessive within the meaning of the Fourteenth Amendment: (1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor. ***Hannula v. City of Lakewood,*** 907 F.2d 129, 131-32 (10th Cir.1990). Force inspired by malice or by "unwise, excessive zeal amounting to an abuse of official power that shocks the

> conscience . . . may be redressed under [the Fourteenth Amendment]." ***Hewitt v. City of Truth or Consequences,*** 758 F.2d 1375, 1379 (10th Cir.1985).

Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1243 (10th Cir. 2003). In ***Roska,*** the Tenth Circuit analyzed an excessive force claim under a substantive due process standard because the court concluded that the plaintiffs had not established a Fourth Amendment seizure. ***Id.*** "[T]he standard for judging a substantive due process claim is whether the challenged government action would 'shock the conscience of federal judges.'" ***Uhlrig v. Harder,*** 64 F.3d 567, 573 (10th Cir. 1995) (quoting ***Collins v. City of Harker Heights,*** 503 U.S. 115, 126 (1992)), ***cert. denied,*** 516 U.S. 1118 (1996).

When evaluating a substantive due process claim in the context of a motion for summary judgment I must determine whether, viewing the facts in the light most favorable to the plaintiff, the challenged government conduct would "shock the conscience of federal judges." ***See Uhlrig v. Harder,*** 64 F.3d 567, 573 (10th Cir. 1995) (quoting ***Collins v. City of Harker Heights,*** 503 U.S. 115, 126 (1992)), ***cert. denied,*** 516 U.S. 1118 (1996) (stating "shocks the conscience" test). If the plaintiff satisfies this standard on summary judgment, then the substantive due process claim ultimately may be resolved by a jury. ***See Johnson v. Holmes,*** 455 F.3d 1133, 1141-1142 (10th Cir. 2006) (upholding jury resolution of

substantive due process claim using "shocks the conscience" standard).

1. Conscience Shocking Conduct

Viewing the facts in the record in the light most favorable to Lemery, as I must, I find that a reasonable fact finder could conclude that French intentionally targeted Lemery with a pepper ball while neither Lemery nor the surrounding circumstances reasonably could have been perceived as a threat to French or to other officers. In that circumstance, there would be a dramatic imbalance in the relationship between the amount of force used and the need presented. Further, Lemery was shot in the eye with a pepper ball, and the extent of the injury inflicted is significant. Finally, if the circumstances were as Lemery portrays them, then French could be seen as having acted with malice or excessive zeal that is outrageous. If a fact finder concluded that the circumstances were as Lemery portrays them, including that French acted with malice or excessive zeal, then I find, as a matter of law, that French's conduct would shock the conscience of this federal judge.

2. Genuine Issues of Material Fact

Having reviewed the arguments, authorities, and evidence presented by the parties, it is apparent that there exist genuine issues of material fact relevant to Lemery's substantive due process claim. Those issues

are not appropriate for summary resolution. Again, viewing the facts in the record in the light most favorable to Lemery, a reasonable fact finder could conclude that French intentionally targeted Lemery with a pepper ball while neither Lemery nor the surrounding circumstances reasonably could have been perceived as a threat to French or to other officers, and that French acted with malice or excessive zeal. If a fact finder reached these conclusions, then a reasonable fact finder could conclude also that French's actions rose to a level of outrageousness and a magnitude of actual harm that are conscience shocking.

3. Conclusion

I must deny the defendants' motion for summary judgment as to Lemery's substantive due process claim because there are genuine issues of material fact relevant to Lemery's substantive due process claim.

C. Qualified Immunity

Both individual defendants argue that the doctrine of qualified immunity shields them from Lemery's claims. The individual defendants are Mark Beckner, Chief of Police of the Boulder Police Department, and Richard French, a Boulder police officer.

Qualified immunity shields public officials from civil damages liability if their actions did not "'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" ***Pino v. Higgs,*** 75 F.3d 1461, 1467 (10th Cir. 1996) (quoting ***Harlow v. Fitzgerald,*** 457 U.S. 800, 818 (1982)). The qualified immunity defense "cannot be analogized to other affirmative defenses because of the interests implicated in suits against government officials. Unlike other affirmative defenses, qualified immunity not only shields a defendant from liability, but is also intended to protect the defendant from the burdens associated with trial." ***Pueblo Neighborhood Health Centers, Inc. v. Losavio,*** 847 F.2d 642, 645 (10th Cir.1988). The defense is only available to those defendants sued in their individual capacities. ***See Moore v. City of Wynnewood,*** 57 F.3d 924, 929 n. 4 (10th Cir.1995).

A motion for summary judgment asserting the defense of qualified immunity must be reviewed differently from other summary judgment motions. ***Holland v. Harrington,*** 268 F.3d 1179, 1185 (10th Cir. 2001), cert. denied, 535 U.S. 1056 (2002). After a defendant asserts qualified immunity, the burden shifts to the plaintiff. ***Scull v. New Mexico,*** 236 F.3d 588, 595 (10th Cir.2000). The plaintiff first must establish "that the defendant's actions violated a constitutional or statutory right." ***Albright v. Rodriguez,*** 51 F.3d at 1531, 1534 (10th Cir. 1995); ***Wilson v. Layne,*** 526 U.S. 603, 609 (1999) (noting the court must first decide whether the plaintiff has

alleged deprivation of a constitutional right). This burden means coming forward with specific facts establishing the violation. ***Taylor v. Meacham,*** 82 F.3d 1556, 1559 (10th Cir.1996).

If the plaintiff establishes a violation of a constitutional or statutory right, then he must demonstrate that the right at issue was clearly established *at the time* of the defendant's alleged unlawful conduct. ***Albright,*** 51 F.3d at 1534. To demonstrate clearly established law, the plaintiff must cite "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts," which find the law to be as the plaintiff maintains. ***Medina v. City and County of Denver,*** 960 F.2d 1493, 1498 (10th Cir.1992). The plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law establishing that the defendant's actions clearly were prohibited. ***Hilliard v. City and County of Denver,*** 930 F.2d 1516, 1518 (10th Cir. 1991) (citing ***Hannula v. City of Lakewood,*** 907 F.2d 129, 131 (10th Cir. 1990). In determining whether the right was "clearly established," the court assesses the objective legal reasonableness of the action at the time and asks whether "the right [was] sufficiently clear that a reasonable officer would understand that what he is doing violates that right." ***Wilson v. Layne,*** 526 U.S. at 615. However, the plaintiff need not establish a "precise correlation between the then-existing law

and the case at hand." ***Patrick v. Miller,*** 953 F.2d 1240, 1249 (10th Cir.1992).

If the plaintiff satisfies both of these elements, the burden shifts to the defendant. Unless the defendant demonstrates that there is no disputed issue of material fact relevant to the immunity analysis, a motion for summary judgment based on qualified immunity must be denied. ***Salmon v. Schwarz,*** 948 F.2d 1131, 1136 (10th Cir.1991). If the plaintiff fails to satisfy either part of the two-pronged inquiry, then the court must grant qualified immunity. ***Albright,*** 51 F.3d at 1535. In short, although the court must review the evidence in the light most favorable to the plaintiff, the record must demonstrate clearly that the plaintiff has satisfied his heavy two-part burden. In civil rights cases, a defendant's unlawful conduct must be demonstrated with specificity. ***Davis v. Gracey,*** 111 F.3d 1472, 1478 (10th Cir. 1997).

I have granted the defendants' motion for summary judgment as to Lemery's Fourth Amendment claim, and, thus, will not address in detail the qualified immunity defense as it concerns the Fourth Amendment claim. Lemery has not established that French's actions constituted a violation of Lemery's Fourth Amendment rights. Further, Lemery has not cited any law that supports his contention that, at the time of the incident, French's actions amounted to a Fourth Amendment seizure under clearly established law. Lemery has not established a Fourth Amendment violation, and the individual defendants are

entitled to qualified immunity as to Lemery's Fourth Amendment claim.

However, as discussed above, I conclude that a reasonable fact finder could find in favor of Lemery on his substantive due process claim, viewing the evidence in the record in the light most favorable to the plaintiff. Lemery has satisfied his burden of coming forward with specific facts establishing an arguable substantive due process violation. Based on the cases cited by the plaintiff in support of his substantive due process claim, and the substantive due process cases discussed in this order, I conclude that there is a substantial correspondence between the conduct alleged by the plaintiff, the evidence cited by the plaintiff, and prior law establishing that such conduct was clearly prohibited under substantive due process standards. The defendants, therefore, are not entitled to qualified immunity concerning Lemery's substantive due process claim.

V. CONCLUSION & ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That the **Motion for Summary Judgment** [#22], filed by defendants Mark Beckner, Richard French, and the City of Boulder on April 3, 2007, is **GRANTED** with regard to the plaintiff's claim under the Fourth Amendment;

2. That, thus, the plaintiff's Fourth Amendment claim is **DISMISSED** with prejudice; and

3. That the **Motion for Summary Judgment** [#22], filed by defendants Mark Beckner, Richard French, and the City of Boulder on April 3, 2007, is **DENIED** with regard to the plaintiff's substantive due process claim.

Dated June 28, 2007, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JONATHAN LEMERY, Plaintiff-Appellee and Cross-Appellant, v. MARK R. BECKNER; RICHARD FRENCH, individually and in his official capacity, Defendants-Appellants and Cross-Appellees, and CITY OF BOULDER, Defendant and Cross-Appellee.	Nos. 07-1290 & 07-1327

ORDER

(Filed Jun. 10, 2009)

Before **BRISCOE**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges.

Appellants-Cross-Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk